

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

NIKITA N. C.,

Plaintiff,

v.

Civil Action No.
5:20-CV-0225 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

OLINSKY LAW GROUP
250 South Clinton Street
Suite 210
Syracuse, NY 13202

HOWARD D. OLINSKY, ESQ
MELISSA DELGEURICO, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
J.F.K. Federal Building
Room 625
15 New Sudbury Street
Boston, MA 02203

HUGH RAPPAPORT, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.¹ Oral argument was heard in connection with those motions on April 15, 2021, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

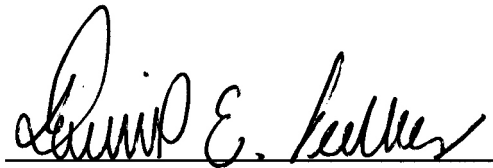
- 1) Defendant’s motion for judgment on the pleadings is

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

GRANTED.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: April 20, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NIKITA N. COSBY, *

Plaintiff, *

-v- 20-cv-225 *

COMMISSIONER OF SOCIAL SECURITY, *

Defendant. *

TRANSCRIPT OF TELECONFERENCE
BEFORE THE HONORABLE DAVID E. PEEBLES
April 15, 2021

FOR THE PLAINTIFF:

MELISSA A. DELGUERCIO, ESQ.
250 South Clinton Street
Syracuse, New York 13202

FOR THE DEFENDANT:

HUGH RAPPAPORT, ESQ.
15 New Sudbury Street
Boston, Massachusetts 02203

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1 THE COURT: Plaintiff has commenced this
2 proceeding pursuant to 42 United States Code,
3 Sections 405(g) and 1383(c)(3) to challenge an adverse
4 determination by the Commissioner of Social Security.

5 The background is as follows:

6 Plaintiff was born in October of 1976 and is
7 currently 44 years of age. She was 37-years-old at the
8 time of the amended onset date attributed to her
9 disability, that being May 22, 2014.

10 Plaintiff is 5 foot, 11 inches in height and
11 has weighed at various times between 234 and 270 pounds.

12 The record is somewhat ambiguous as to
13 plaintiff's living conditions. At one point she was
14 living with a girlfriend in an apartment, and at another
15 point it was reported that she was homeless.

16 Plaintiff has an 11th grade education and was
17 in special education classes while in school. She also
18 has some sort of certifications in hotel management and
19 cooking. Plaintiff is left-handed and has a driver's
20 license.

21 I have to say before I go further that the
22 record in this case was extremely poorly developed, but
23 I note that plaintiff was represented, and without
24 diminishing the administrative law judge's obligation to
25 flesh out the record, ultimately, it is plaintiff's

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1 burden to demonstrate her conditions and the resulting
2 limitations associated with those conditions.

3 Plaintiff stopped working in January of 2011.
4 Her prior work consists of and includes as a clothing
5 sorter, a janitor, a groundskeeper, a babysitter, and in
6 some position in a blacktop/landscape operation where
7 she did flagging, among other things.

8 Physically, plaintiff suffers from Type 2
9 diabetes and resulting neuropathy, as well as asthma,
10 for which she uses an inhaler and nebulizer, a lumbar
11 back issue with reported pain extending into her legs,
12 and pain and carpal tunnel syndrome possibly in her
13 hands.

14 Plaintiff underwent stomach surgery in 2013
15 and groin surgery in 2005. Plaintiff reportedly was
16 involved in a motor vehicle accident on July 6th, 2013.
17 She has had both magnetic resonance imaging, or MRI,
18 testing of her back and x-rays.

19 On July 28th, 2013, MRI testing revealed a
20 small posterior central disc protrusion at L4-L5 and
21 L5-S1, not causing significant central spinal canal
22 stenosis; that appears at page 529 of the administrative
23 transcript.

24 On July 21, 2016, MRI testing reflected
25 minimal degenerative disc disease L4 -- L3-L4, very

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1 small midline posterior L3-L4 disc protrusion extending
2 only 2 millimeters into the spinal canal, and mild
3 degenerative disc disease L5-S1, mild blood-based
4 posterior L5-S1 disc protrusion extending only 3
5 millimeters into the spinal canal. The results of that
6 testing appear at 1028 and 1029 of the administrative
7 transcript.

8 X-rays taken on July 19, 2016, revealed mild
9 degenerative changes L5-S1 and mild bilateral
10 degenerative changes SI joints. That report appears at
11 1121 of the administrative transcript.

12 Mentally, plaintiff has suffered from reported
13 anxiety and depression. For mental condition, she has
14 undergone counseling with Psychiatric Nurse Practitioner
15 Ann Sweet. She has not undergone any hospitalization.
16 Plaintiff's primary care provider was or is Dr. Joseph
17 Merola. She also has treated at the Joslin Center
18 including with Dr. Barbara Mols-Kowalczewski, as well as
19 Upstate, where she has seen Dr. Burk Jubelt and a
20 resident, Dr. Sanam Anwer. She has also treated with
21 St. Joseph's Family Medical with P.A. Joseph Morabito
22 and Syracuse Orthopedics, or SOS, with Dr. Richard
23 DiStefano.

24 Plaintiff has been prescribed various
25 medications, including Lyrica, oxycodone, gabapentin,

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1 Cymbalta, Neurontin, Prazosin, Trazodone, Buspirone, and
2 Wellbutrin.

3 Plaintiff's activities of daily living have
4 included dressing; bathing; grooming; cooking, which she
5 likes to do and does fairly often; housework, some;
6 shopping, some; no dishes; no laundry. She takes public
7 transportation. She drives, she reads, plays sports,
8 gets along well with people, went on a Bahamas cruise in
9 February of 2016; attends family cookouts, likes to
10 fish, and wants to open a restaurant and exercises.

11 In 2013, plaintiff was apparently arrested for
12 driving while intoxicated and underwent subsequent drug
13 treatment as reflected at 12-F and 16-F. She is also a
14 regular user of marijuana, and by that I mean the record
15 reflects she uses marijuana as often as two to three
16 times daily.

17 Procedurally, plaintiff applied for Title 16,
18 Supplemental Security Income payments on May 22nd, 2014,
19 alleging an onset date of December 31, 2010. That was
20 later amended to May 22, 2013. She claimed disability
21 based on diabetes, asthma, a learning disability, drug
22 and alcohol problems, and back injury. I note that that
23 followed a prior adverse administrative law judge
24 decision on March 22, 2013.

25 A hearing was conducted by Administrative Law

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1 Judge Bruce S. Fein on July 28, 2016, to address
2 plaintiff's request for SSI benefits. ALJ Fein issued
3 an adverse decision on September 19th, 2016. The matter
4 was subsequently remanded by the Social Security
5 Administration Appeals Council on January 17th, 2018,
6 with a directive that vocational expert testimony be
7 elicited to determine the extent of any erosion of the
8 job base on which the medical-vocational guidelines are
9 predicated, and also to adequately consider plaintiff's
10 obesity.

11 A second hearing was conducted on
12 November 6th, 2018. ALJ Fein issued another decision on
13 January 24, 2019; also unfavorable to the plaintiff.

14 The Social Security Administration Appeals
15 Council denied review of that decision on December 30,
16 2019, making the administrative law judge's opinion the
17 final determination of the agency.

18 This action was commenced on February 28th,
19 2020, and is timely.

20 In his decision, ALJ Fein applied the familiar
21 five-step sequential test for determining disability.
22 He concluded at step one that plaintiff had not engaged
23 in substantial gainful activities since May 22, 2014,
24 although he noted that there had -- there was some work
25 that was performed by the plaintiff after that date.

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1 At step two, ALJ Fein concluded the plaintiff
2 does suffer from impairments that are severe in that
3 they provide more than a minimal limitation on
4 plaintiff's ability to perform basic work functions,
5 including low back pain with bilateral sciatica,
6 neuropathy, post-traumatic stress disorder, depressive
7 disorder, and anxiety disorder.

8 At step three, the administrative law judge
9 concluded the plaintiff's conditions do not meet or
10 medically equal any of the listed presumptively
11 disabling conditions set forth in the commissioner's
12 regulations, specifically considering listings 1.04,
13 11.13, 12.04, 12.06, 12.15.

14 The administrative law judge next concluded
15 that notwithstanding her conditions, plaintiff
16 maintained her residual functional capacity, or RFC, to
17 perform light work subject to both physical and mental
18 limitations.

19 Physically, he found the plaintiff cannot
20 crawl or climb ladders, ropes, or scaffolds and can only
21 occasionally climb ramps and stairs, balance, stoop,
22 kneel and crouch.

23 He also found that claimant should also avoid
24 concentrated exposure to operational control of moving
25 machinery, unprotected heights, and hazardous machinery.

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1 Mentally, he found that the claimant is
2 limited to performing simple routine repetitive tasks.
3 She also requires a low-stress job, which is defined as
4 involving only occasional decision making, occasional
5 use of judgment, and occasional changes in work setting.

6 At step four, Administrative Law Judge Fein
7 concluded that plaintiff did not have any past relevant
8 work to examine and proceeded to step five.

9 At step five, he first noted that if plaintiff
10 were capable of performing a full range of light work, a
11 finding of no disability would be required by
12 consideration of the medical-vocational guidelines or
13 grids set forth in the commissioner's regulations,
14 specifically citing Grid Rule 202.17.

15 Considering the testimony of the vocational
16 expert and the issue of erosion based on exertional and
17 nonexertional limitations, ALJ Fein concluded the
18 plaintiff is capable of performing in positions that are
19 available in the national workforce, and representative
20 examples included laundry folder, label coder and
21 marker, and concluded plaintiff, therefore, was not
22 disabled at relevant times and ineligible for the
23 benefits sought.

24 As the commissioner rightfully argues,
25 the test that the Court must apply in this case is

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1 extremely deferential. I must determine whether correct
2 legal principles were applied and the resulting
3 determination is supported by substantial evidence,
4 which is defined as such relevant evidence as a
5 reasonable mind would consider adequate to support a
6 conclusion.

7 As the Second Circuit has noted in *Brault*
8 *versus Social Security Administration Commissioner*,
9 683 F.3d 443, 2012, the standard is extremely rigid. It
10 is even more deferential than the clearly erroneous
11 standard that orders are familiar with.

12 The Second Circuit additionally noted in
13 *Brault* that the standard means that once an ALJ finds a
14 fact, that fact can be rejected only if a reasonable
15 fact finder would have to conclude otherwise.

16 The plaintiff in this case raises two basic
17 contentions. The first concerns the physical components
18 of the residual functional capacity and specifically
19 centers upon the amount of weight afforded to
20 Dr. Anwer's and Dr. Jubelt's medical source statement.
21 The second addresses the mental components of the RFC
22 and again focuses on improper weight given to the
23 opinion of Nurse Practitioner Sweet, signed off on by
24 Dr. Walia and also supported, in plaintiff's view, by
25 Dr. Caldwell and Dr. Kahn.

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1 Before I address those contentions, I noted
2 one additional error. The hypothetical that was posed
3 to the vocational expert did not exactly mirror the
4 residual functional capacity finding in that it did not
5 include the limitation of only occasional climb ramps or
6 stairs, balance, stoop, kneel and crouch.

7 And so, I examined that issue, although it may
8 well have been an issue that is waived by the plaintiff
9 since it is not raised. It turns out that when you
10 review the Dictionary of Occupational Titles, in two of
11 the three exemplary positions cited, there's no
12 climbing, balancing, stooping, kneeling, and crouching
13 required and that would be true of the folder, which is
14 a Dictionary of Occupational Titles 369.687-018,
15 appearing at Westlaw -- 1991 Westlaw 673072. It's also
16 true of the position of marker, that's Dictionary of
17 Occupational Titles 209.587-034 appearing at 1991
18 Westlaw 671802, and the third one, label coder, which
19 appears at Dictionary of Occupational Title 920.587-014,
20 reported at 1991 Westlaw 687915, there is occasional
21 climbing required, and occasional stooping required, but
22 then again, that is consistent with the residual
23 functional capacity finding.

24 So, I find that there was no error or, at
25 best, it is harmless error. Turning to the physical

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1 component of the residual functional capacity, as a
2 backdrop, let me note that one of the primary functions
3 and pivotal to a consideration of a disability claim is
4 determination of residual functional capacity, which
5 represents a finding of the range of tasks that a
6 claimant is capable of performing, notwithstanding his
7 or her impairments, 20 CFR Section 40 -- in this case
8 416.945, and *Tankisi versus Commissioner of Social*
9 *Security*, 521 F.App'x 29 from the Second Circuit 2013.

10 An RFC determination of course is informed by
11 the consideration of all of the relevant medical and
12 other evidence.

13 The administrative law judge's RFC finding of
14 course must be supported by substantial evidence. As a
15 backdrop also, I note that under *Poupore* from the Second
16 Circuit, it is plaintiff's burden to establish her
17 limitations up through step four, including at the RFC
18 stage.

19 One of the issues -- key issues raised with
20 regard to the physical components of the RFC finding is
21 considerations of the medical source statement of
22 Resident Dr. Anwer, signed off on by Dr. Jubelt, dated
23 April 20, 2016. It appears at pages 641 through 644 of
24 the administrative transcript.

25 After identifying symptoms that the plaintiff

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1 would experience, Dr. Anwer and Dr. Jubelt were asked to
2 opine concerning sitting, standing, and walking at
3 page 642. The result is quite ambiguous. There are two
4 columns intended for checkmarks. There are no
5 checkmarks. Instead, the doctors have circled about
6 four hours without indication of whether that is
7 cumulative of sitting, standing, walking, or whether it
8 applies to each category.

9 The opinion goes on to state that plaintiff
10 can occasionally lift 10 pounds and less than 10 pounds,
11 and also opines that plaintiff would be off task more
12 than 20 percent of the time and absent more than four
13 days per month. That opinion was discussed by the
14 administrative law judge and -- at page 31 and given
15 little weight.

16 The administrative law judge noted that
17 plaintiff had only treated with those physicians for two
18 months, that it was inconsistent with plaintiff's
19 activities of daily living and inconsistent with
20 plaintiff's hearing testimony, particularly with regard
21 to lifting.

22 I note first that these individuals are
23 properly regarded as treating sources. The opinion of
24 the treating source regarding the nature and severity of
25 an impairment is entitled to considerable deference if

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1 it is supported by medically acceptable clinical and
2 laboratory diagnostic techniques and is not inconsistent
3 with other medical evidence; *Veino versus Barnhart*,
4 312 F.3d 578, Second Circuit 2002.

5 Treating source opinions are not controlling,
6 however, if they are contrary to other substantial
7 evidence in the record, including the opinions of other
8 medical experts.

9 Of course where there are conflicts in the
10 form of contradictory medical evidence, the resolution
11 is properly entrusted to the commissioner under *Veino*.

12 The administrative law judge is not giving
13 controlling weight to attributing source opinion
14 must detail what degree of weight, if any, should be
15 assigned to the opinion and consider the relevant
16 factors set out in 20 CFR Section 416.927, sometimes
17 referred to as the *Burgess* factors in this case, and I
18 note, of course, that this case is being decided under
19 the former regulations governing medical opinions
20 because this claim was filed prior to March of 2017.

21 In this case, Dr. Anwer's opinion comes on the
22 form of a checkbox. It's marginally useful and, as I
23 indicated, ambiguous, at least with regard to sitting,
24 standing, and walking.

25 I note that plaintiff -- the administrative

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1 law judge relied on activities of daily living. In
2 this, plaintiff -- as defense counsel noted, in his
3 prior decision, ALJ Fein also relied on the same
4 activities of daily living and, despite that, in the
5 second hearing, at which plaintiff was represented, she
6 did not adduce any additional evidence regarding her
7 activities of daily living and the fact that they
8 undermine Dr. Anwer's opinions.

9 Under *Estrella Berryhill* 925 F.3d 90 from
10 2019, Second Circuit, the Court must make a searching
11 record of -- a searching review of the record and
12 determine, considering the record as a whole, whether
13 the treating source rule was violated. In this case I
14 find that it was not.

15 The administrative law judge marshaled the
16 evidence concerning plaintiff's physical condition,
17 including at pages 28 and 29. The residual functional
18 capacity finding was supported by other medical evidence
19 in the record, including the opinion of consultative
20 examiner Dr. Kalyani Ganesh, who, after examining the
21 plaintiff, issued an opinion on July 31st, 2013, finding
22 that plaintiff did not have any gross physical
23 limitation noted; sitting, standing, walking, use of
24 upper extremities; that appears at page 637 of the
25 administrative transcript.

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1 The RFC finding is also supported by the
2 findings of non-examining counsel consultative expert
3 Dr. Leong, including 23-F and 24-F of the administrative
4 transcript.

5 One limitation of course, as Dr. Ganesh noted,
6 was an environmental limitation which the administrative
7 law judge properly rejected based upon plaintiff's heavy
8 use of marijuana.

9 I note that the plaintiff does cite a case
10 that she believes supports her position, *Nelson versus*
11 *Bowen*, 882 F.3d 45 from the Second Circuit 1989. It's
12 an old case, and it significantly predated the *Poupore*
13 and other opinions which made clear that the burden was
14 on the plaintiff and not the commissioner to prove
15 residual functional capacity, it is also
16 distinguishable.

17 The plaintiff quarrels with consideration of
18 activities of daily living. Clearly, the reported
19 activities of daily living are properly considered,
20 *Alpeter versus Commissioner of Social Security*, 27
21 Westlaw 4443978 from Chief Judge Glenn T. Suddaby.
22 Obviously there needs to be some consideration of the
23 relation between the administrative -- the activities of
24 daily living and the function in question.

25 But the bottom line is I'm unable to state

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1 that a reasonable fact finder would have to credit the
2 medical source statement of Dr. Anwer, and so I find,
3 based on the totality of the evidence, including but not
4 limited to the opinions of Dr. Ganesh and Dr. Leong,
5 that the physical aspects of the residual functional
6 capacity finding are supported.

7 Turning to the mental condition, the
8 plaintiff, the focus would as --

9 (Technical issues)

10 THE COURT: The focus is on the opinion of
11 Nurse Practitioner Ann Sweet, that it --

12 (Technical issues)

13 (Discussion held off the record)

14 THE COURT: Addressing the mental residual
15 functional capacity, plaintiff's challenge focuses on an
16 opinion issued by Nurse Practitioner Ann Sweet and
17 cosigned by Dr. Katherine Walia, dated July 7th, 2016,
18 is Exhibit 9-F and appears at 696 to 698 of the
19 administrative transcript.

20 It is a checkbox form. It lists symptoms of
21 the plaintiff. It then asks to opine concerning
22 plaintiff's abilities in several areas, A through U.
23 The opinion indicates that plaintiff is unable to meet
24 competitive standards in 11 categories. The opinion is
25 discussed by Administrative Law Judge Fein at pages 30

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1 and 31 of the administrative transcript and given no
2 weight.

3 I note initially that is unclear what
4 Dr. Walia's role is. There is not any indication that
5 she has treated the plaintiff and, therefore, does not
6 qualify as a treating source. Nurse Practitioner Sweet,
7 of course, under the former regulations, is not an
8 acceptable medical source. The reasons cited will note
9 given no weight includes the inconsistency of
10 plaintiff's activities of daily living, and the fact
11 that it is based in many respects on subjective reports,
12 including the report that plaintiff feels that her
13 neuropathy is incapacitating, that appears at 697, a
14 proper consideration under *Gates versus Astrue*,
15 338 Fed Appx. 46, Second Circuit 2019. The opinion is
16 also equivocal and use of the term "possible" in several
17 respects, and it is based, at least in part, on the
18 interplay between plaintiff's physical symptoms and her
19 mental condition.

20 I note that the issue of Dr. Walia's
21 involvement was identified in the first hearing in this
22 matter and decision, but there was no proof offered at
23 the second hearing as to Dr. Walia's involvement.

24 The opinion is also inconsistent with the
25 evidence in question. For example, Nurse Practitioner

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1 Sweet opines that plaintiff is unable to use public
2 transportation. The plaintiff admitted to Dr. Caldwell,
3 at page 631, that she is capable using of public
4 transportation.

5 The opinion is also inconsistent with the
6 opinions of Dr. Christina Caldwell, a psychiatrist who
7 examined the plaintiff and issued an opinion on July 31,
8 2014, that is consistent with the residual functional
9 capacity finding. In other words, the limitations set
10 forth at 631 and 632 of Dr. Caldwell's opinion has been
11 accommodated by the residual functional capacity.

12 Dr. Kamin, an agency expert, non-examining,
13 issued an opinion on August 12th, 2014, that's
14 Exhibit 3-A, that also supports the finding of the
15 administrative law judge, found only moderate limitation
16 in several areas and opined that -- issued a mental
17 residual functional capacity assessment; however, that
18 is not inconsistent with the residual functional
19 capacity he found.

20 There is a stress limitation set forth in
21 Dr. Caldwell's opinion, and that is addressed in the
22 residual functional capacity finding -- there's a stress
23 limitation found by Dr. Caldwell that is addressed in
24 the residual functional capacity finding *Tatelman versus*
25 *Colvin*, 296 F. Supp. 3d 608 from the Western District of

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1 New York, 2017.

2 In support of his mental RFC finding, the
3 administrative law judge cited treatment records and the
4 opinions of Dr. Caldwell. The rejection of Nurse
5 Sweet's opinion is supported by substantial evidence and
6 a finding that the mental health component of the RFC is
7 also supported by substantial evidence.

8 Turning to step five, I conclude with the
9 exception that I mentioned at the outset, that
10 the residual functional capacity finding was presented
11 to the vocational expert, and the step five
12 determination at which the commissioner bears the burden
13 of proof was supported by substantial evidence based on
14 vocational experts testimony.

15 So, in conclusion, I will grant judgment on
16 the pleadings to the defendant and order dismissal of
17 plaintiff's complaint.

18 Thank you all for excellent presentation. I'm
19 sorry that we had to deal with the conditions of the
20 telephone service. I wish you all well and stay safe.

21 (Proceeding concluded)

22 * * * * *

23
24
25

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C E R T I F I C A T I O N

I, Lisa L. Tennyson, RMR, CSR, CRR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct excerpt of the transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

 /s/ Lisa L. Tennyson

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